No. 80-980

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In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANCESCO MICHIENZI AND AUDREY F. MICHIENZI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge erred in preventing petitioners from asking a prosecution witness the address to which she had recently moved when petitioners had substantial background information about the witness and the witness feared reprisals by petitioners.

2. Whether, in the circumstances of this case, the trial judge's improper personal greeting to a prosecution witness was remedied by the court of appeals' reversal of the conviction on the only count to which the witness testified.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Alford v. *United States*, 282 U.S. 687 ..... 3, 4, 5, 6

McGrath v. *Vinzant*, 528 F. 2d 681, cert. dismissed, 426 U.S. 902 5

Smith v. *Illinois*, 390 U.S. 129 ..... 4, 5, 6

United States v. *Alston*, 460 F. 2d 48, cert. denied, 409 U.S. 871 ..... 4, 5, 6

United States v. *Cavallaro*, 553 F. 2d 300 6

United States v. *Contreras*, 602 F. 2d 1237, cert. denied, 444 U.S. 971 ..... 4, 5, 6

United States v. *Enstam*, 622 F. 2d 857 5

United States v. *Fife*, 573 F. 2d 369, cert. denied, 430 U.S. 933 ..... 4, 5

United States v. *McKinley*, 493 F. 2d 547 5

United States v. *Smaldone*, 484 F. 2d 311, cert. denied, 415 U.S. 915 ..... 4, 5, 6

Statutes:

18 U.S.C. 1001 2

18 U.S.C. 1341 1

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 630 F. 2d 455.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980. A petition for rehearing was denied on October 17, 1980 (Pet. App. 3a). The petition for a writ of certiorari was filed on December 15, 1980. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

STATEMENT

1. Following a jury retrial[1] in the United States District Court for the Northern District of Ohio, petitioners were convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341, and on one count of making a false statement,

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[1]Petitioners' first trial resulted in a mistrial.

in violation of 18 U.S.C. 1001. Petitioners were sentenced to concurrent five-year terms of imprisonment on each count, with all but six months suspended, and to a fine of $1,000 on each count.

Petitioners operated a private medical clinic in Sandusky, Ohio. The indictment alleged, and the government's evidence established, that petitioners obtained Medicare and Medicaid payments by submitting fraudulent claims (Pet. App. 1a; J.A. 12-30).[2] During the trial Rosemary Ging, a former employee in the clinic office, testified that petitioners directed her to ask patients to sign two or three blank Medicaid insurance forms and that petitioners sometimes altered treatment forms by adding to them unperformed services and procedures (J.A. 770-772). Ging had testified during petitioners' first trial that petitioners and members of their family had threatened to harm her and her five year old son. Following that trial, she moved from Sandusky to Tennessee. Prior to her testimony at the retrial, the government cited her previously expressed fear and moved that petitioners be barred from asking her, on cross-examination, to give her Tennessee address. Finding that the new address was "totally irrelevant," the trial judge granted the motion (Supp. A. 3-4). The judge subsequently explained that Sandusky was the only relevant community for purposes of probing the issue of credibility, since Ging's move to Tennessee was recent (J.A. 915-916).

During extensive cross-examination, petitioners questioned Ging about her educational background, her membership in professional associations, her previous employment, her employment by petitioners and her relationship

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[2] "J.A." refers to the joint appendix in the court of appeals. "Supp. A." refers to the supplemental appendix in that court.

with them, her family, a head injury which she had suffered and her efforts to obtain Workmen's Compensation Insurance for it, and her failure to testify fully at previous proceedings as the result of fear and threats (*e.g.*, J.A. 753, 836, 850, 851, 854, 875, 909-913). With respect to the threats, Ging testified that when she decided to terminate her employment with petitioners because of their fraudulent activities, she was told that she would be cutting her own throat, and she was reminded that she had a young son (J.A. 790-791, 911-912, 932). Following this testimony, petitioners renewed their motion to question Ging concerning her current residence (J.A. 913). The court again denied the motion.

2. At the conclusion of the government's direct examination of a witness who testified concerning one of the mail fraud counts (J.A. 724-727), the trial judge rose from the bench, went to the witness stand, and spoke with the witness in the presence of the jury. The judge subsequently informed the jury that he and the witness were old friends (J.A. 727; Pet. App. 2a), and said that he would greet any defense witnesses who were old friends in the same way (J.A. 800).

3. The court of appeals affirmed the convictions on the false statement count and on one of the mail fraud counts. It reversed the conviction on the mail fraud count about which the witness whom the judge greeted had testified. The court said that the judge's "greeting to his old friend" was "plainly not intended to sway the jury" but "may have lent undue weight to the testimony given by the witness involved" (Pet. App. 2a).

ARGUMENT

1. Relying on *Alford* v. *United States*, 282 U.S. 687 (1931), petitioners contend (Pet. 8-13) that their convictions must be reversed because the trial judge refused to permit them to elicit Ging's Tennessee address during cross-examination. This Court has repeatedly denied petitions for

certiorari presenting similar claims. See, *e.g.*, *United States* v. *Contreras*, 602 F. 2d 1237 (5th Cir.), cert. denied, 444 U.S. 971 (1979); *United States* v. *Fife*, 573 F. 2d 369 (6th Cir. 1976), cert. denied, 430 U.S. 933 (1977); *United States* v. *Smaldone*, 484 F. 2d 311 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *United States* v. *Alston*, 460 F. 2d 48, 52 (5th Cir.) (collecting cases), cert. denied, 409 U.S. 871 (1972). Petitioners' claim is, in fact, singularly weak in the particular circumstances of this case.

Petitioners incorrectly interpret *Alford* as imposing an inflexible requirement that a witness's home address must be divulged whenever such information is demanded during cross-examination. But *Alford* simply holds that the defendant is entitled to elicit testimony identifying the witness with his community "so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood [and] that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment." *Alford*, *supra*, 282 U.S. at 691 (citations omitted); see *Smith* v. *Illinois*, 390 U.S. 129, 131-132 (1968); *United States* v. *Alston*, *supra*, 460 F. 2d at 51. Far from establishing an inflexible rule, the *Alford* Court explained that "[p]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test * * *." *Alford*, *supra*, 282 U.S. at 692.

The trial judge's ruling here was fully consistent with these principles. Ging lived in Sandusky until shortly before the retrial, was employed there by petitioners, and testified to events that occurred there. Plainly, Ging's "proper setting"—the community that might yield information about her credibility or reflect on it—was Sandusky. Petitioners' questions, and the fact that they had previously employed Ging, demonstrate that they were fully aware of her history in Sandusky. They cross-examined Ging in

detail concerning her education, employment, family, associations, health, and other details of her life while she was an Ohio resident; thus the jury had abundant information with which to assess her credibility. See, *e.g.*, *United States* v. *Contreras, supra,* 602 F. 2d at 1239-1240; *United States* v. *Fife, supra,* 573 F. 2d at 377; *United States* v. *McKinley,* 493 F. 2d 547, 551 (5th Cir. 1974); *United States* v. *Smaldone, supra,* 484 F. 2d at 319; *United States* v. *Alston, supra,* 460 F. 2d at 53; see also *United States* v. *Enstam,* 622 F. 2d 857, 867 (5th Cir. 1980).

In view of petitioners' extensive cross-examination of Ging, the abundant evidence bearing on her credibility, and the fact that her residence in Tennessee had been brief, the value of her new address was inconsequential.[3] See *McGrath* v. *Vinzant,* 528 F. 2d 681, 685 (1st Cir.), cert. dismissed, 426 U.S. 902 (1976). The contrast with *Alford* itself is instructive. There, the witness's "address" would have revealed that he was in federal custody. Moreover, there was no suggestion that the witness had a far more extensive and more relevant background in another community and that the defendant had access to information about that background. See *Alford, supra,* 282 U.S. at 692-694. Similarly, in *Smith* v. *Illinois, supra,* 390 U.S. at 131, the defense was forbidden from asking not only the witness's address but his real name; the Court suggested that, as a result, the defense lacked the information needed for even a "rudimentary"

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[3]Moreover, as petitioners concede (Pet. 6), they did, in fact, apparently know Ging's Tennessee address; it appeared on a subpoena issued to her. Despite the trial judge's order, petitioners asked Ging whether she had been subpoenaed at that address; an objection to the question was sustained (J.A. 885). Although petitioners were armed with this address, they do not claim that they uncovered any damaging information about Ging's reputation in Tennessee; no such evidence was offered at the trial.

cross-examination. Petitioners' cross-examination of Ging was, of course, far more than rudimentary.[4]

2. Petitioners also contend (Pet. 8, 13-14) that the trial judge's conduct toward one of the government's witnesses following his testimony improperly lent credibility to that testimony and therefore implicitly impugned the testimony of petitioner Francesco Michienzi. We agree that the judge's action was improper, but this issue is plainly not one appropriate for review by this Court. The court of appeals concluded that any improper influence on the jury that might have resulted from the judge's conduct was limited to the count concerning which the witness testified. Petitioners' conviction on that count was vacated. The court of appeals' further conclusion that there was no meaningful risk of prejudice requiring reversal on the other counts turns on an evaluation of the particular circumstances of this case and presents no significant legal issue.

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[4]In addition, as this Court suggested in *Alford* and as Justice White explained in his concurrence in *Smith*, *supra*, 395 U.S. at 133-134, a trial judge may bar questions which tend merely to harass, annoy, or humiliate a witness, or which tend to endanger the safety of the witness. See, *e.g.*, *United States* v. *Contreras*, *supra*, 602 F. 2d at 1239; *United States* v. *Cavallaro*, 553 F. 2d 300, 304 (2d Cir. 1977) (collecting cases); *United States* v. *Smaldone*, *supra*, 484 F. 2d at 318; *United States* v. *Alston*, *supra*, 460 F. 2d at 52 (collecting cases). Here the witness's testimony as well as the prosecutor's representations concerning the threats she had received demonstrated that her fear of divulging her address was well founded. Petitioners' assertion (Pet. 4) that the trial judge made a contrary finding is incorrect; the judge simply stated that, whatever his personal view, the "harsh reality" was that the witness was frightened (Supp. A. 3). When the judge made this statement, he was explaining that, apart from the need to protect the witness against actual disclosure of the new address, even petitioners' questions about the new address might, given its limited relevance, "play on the fears of the witness" (Supp. A. 4) and thus harass or intimate her (Supp. A.4-5).

Petitioners argue (Pet. 12) that their asking the witness a question that apparently revealed knowledge of her address, see note 3, *supra*,

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

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removed the basis for the government's objection to questions about the new address. In fact, of course, petitioners' learning the address by other means belies their claim that they were prejudiced by the judge's ruling that they could not obtain it from the witness. The trial judge would surely have been reasonable to conclude, as he apparently did, that forcing the witness to confirm her address would heighten her anxiety and might intimidate her. And petitioners' insistence on asking Ging to confirm her address lends support to the trial judge's concern that giving petitioners the opportunity to question Ging about her address might result in her being intimidated.